STATE OF MICHIGAN

COURT OF APPEALS

BELINDA EDWARDS, Individually, and as Next Friend for MYAH HALL, a Minor, Plaintiff-Appellant, v OAKLAND LIVINGSTON HUMAN SERVICE AGENCY, TAMMY CRYDERMAN, SONYA JOHNSON, PAM MCLEAN, and DAWN MILLER, Defendants-Appellees.	UNPUBLISHED April 20, 2006 No. 263738 Oakland Circuit Court LC Nos. 2002-043198 – NO; 2001-055429 – NO

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting all defendants summary disposition pursuant to MCR 2.116(C)(7). We reverse and remand.

Plaintiff's three-year-old daughter attended Frost Head Start, which is owned and operated by defendant Oakland Livingston Human Service Agency ("OLHSA"). According to plaintiff's complaint, on February 11, 2003, plaintiff's daughter and a four-year-old boy were the only two children in a classroom supervised by defendant Tammy Cryderman, the head teacher, and Sonya Johnson, a teacher's aide. Cryderman left the room for approximately 5 to 10 minutes,[1] during which the boy put his fingers in plaintiff's daughter's vagina and a toy in her rectum.[2]

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7), arguing that OLHSA was a governmental agency, and therefore, OLHSA was entitled to governmental immunity, as were the four individual defendants because their conduct did not

[1] According to plaintiff's daughter, Johnson was in the classroom washing tables when the incident occurred.

[2] Plaintiff's daughter testified in her deposition that the boy put a toy in her vagina.

amount to gross negligence. Defendants also filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that the individual defendants did not owe plaintiff's daughter a duty to protect her from the unforeseeable acts of the boy. The trial court granted defendants' motion pursuant to MCR 2.116(C)(7). The trial court did not decide if the individual defendants owed plaintiff's daughter a duty to protect her from the conduct of the boy.

Plaintiff first argues that the circuit court erred in holding that OLHSA was a governmental agency. We agree.

This Court reviews a trial court's order on a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Stanton v Battle Creek*, 237 Mich App 366, 374; 603 NW2d 285 (1999), aff'd 466 Mich 611; 647 NW2d 508 (2002). A party is entitled to summary disposition under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . immunity granted by law . . . ." MCR 2.116(C)(7). A motion brought pursuant to MCR 2.116(C)(7) requires consideration of all documentary evidence presented by the parties. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Furthermore, the issue of whether an entity is entitled to governmental immunity is a question of law for this Court. *Baker v Waste Management*, 208 Mich App 602, 605; 528 NW2d 835 (1995).

A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). A governmental agency is the state or a political subdivision. MCL 691.1401(d). The circuit court's basis for holding that OLHSA is a governmental agency was that OLHSA is a community action agency. According to the Michigan Economic and Social Opportunity Act of 1981, MCL 400.1101 *et seq.*, a community action agency serves as an advocate for the reduction of the causes, conditions, and effects of poverty. MCL 400.1109. The Legislature has given the director of the bureau of community action and economic opportunity the authority to designate any of the following as a community action agency: (1) a public office or agency of one or more units of local government; (2) a nonprofit private agency serving one or more units of local government; and (3) a public or private nonprofit agency designated by one or more native American tribal governments. MCL 400.1105(e); 400.1108(1)(a)-(d). The Economic Opportunity Act of 1964 provided federal assistance to "community action programs" that provided services, assistance, and other activities to the cause of eliminating poverty. PL 88-452, §§ 202, 203-205, 78 Stat 508. A community action program could be "conducted, administered, or coordinated by a public or private nonprofit agency (other than a political party), or a combination thereof." *Id.*, § 202(a)(4). OLHSA, a nonprofit private agency, has not provided any law, nor are we aware of any, that transforms a private agency into an agency of the state or into a political subdivision simply by its designation as a community action agency. Accordingly, the fact that OLHSA is a community action agency is not the dispositive factor in determining whether OLHSA is a governmental agency.

Rather, the dispositive factor in determining whether OLHSA is a governmental agency is how OLHSA was formed. See *Baker, supra* (holding the Western Townships Utilities Authority was entitled to governmental immunity because it was formed by three Michigan townships); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223; 393 NW2d 847 (1986) (holding the Peoples Community Hospital Authority was entitled to governmental immunity because it was formed by 24 southeastern Michigan communities). Furthermore, a private entity's performance of a governmental function does not cloak the private entity with

governmental immunity. See *Jackson v New Center Community Mental Health Services*, 158 Mich App 25, 35; 404 NW2d 688 (1987). The *Jackson* Court stated the following:

> Notwithstanding its performance of a "governmental function" [providing mental health services] and its reliance on public funding, New Center retains its identity as a nongovernmental entity. Its employees are not county employees. It retains its separate corporate identity and is governed by its own board of directors. Except as it has voluntarily obligated itself by contract, New Center is not required to provide services or to remain in existence. While it may have been created in response to the recognition of mental health needs in Detroit, New Center's creation was not mandated by law.
>
> We are persuaded of no reason to treat a private entity as a governmental agency merely because that entity contracts with a governmental agency to provide services which the agency is authorized or mandated to provide. [*Id.*]

OLHSA has asserted that Oakland and Livingston Counties formed OLHSA. However, OLHSA has not provided any evidence that it was formed by these two counties. Rather, OLHSA's articles of incorporation demonstrate that three men incorporated it on a nonstock basis in 1964. This distinguishes OLHSA from the Western Townships Utilities Authority in *Baker*, *supra*, and the Peoples Community Hospital in *Hyde*, *supra*. While OLHSA was incorporated in 1964 in response to the level of poverty in Oakland and Livingston Counties, OLHSA's creation was not mandated by law, nor is there evidence that OLHSA is required to remain in existence and to continue to provide its services. In addition, although OLHSA, as a community action agency, has the authority to enter into contracts with federal, state, and local agencies to carry out its programs and to receive federal, state, and local funds that support its programs, MCL 400.1104(5); MCL 400.1109; MCL 400.1110(1), it has maintained its separate corporate identity. Because the evidence establishes that OLHSA was incorporated by three individual men, and not by one or more local units of government, OLHSA is not a governmental entity and, therefore, it is not entitled to governmental immunity.

Because OLHSA is not entitled to governmental immunity, we need not address plaintiff's arguments that OLHSA's and the individual defendants' answers to plaintiff's complaint and OLHSA's answers to plaintiff's interrogatories prevent defendants from asserting governmental immunity. We also need not address plaintiff's argument that the trial court erred in holding that the conduct of the individual defendants did not amount to gross negligence.

Plaintiff also argues that the individual defendants owed her daughter a duty to protect her from the conduct of the boy. We agree.

Generally, this Court limits its review to issues actually decided by the circuit court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). However, this Court may address an issue not decided by the circuit court if the issue is a question of law and the parties have presented all facts necessary for its resolution. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 723; 697 NW2d 539 (2005). Such is the case here. The existence of a legal duty is a question of law. *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86; 679 NW2d 689 (2004).

As a general rule, a person has no duty to protect others from the criminal acts of third parties. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498-499, 418 NW2d 381 (1988); *Graves v Warner Bros*, 253 Mich App 486, 493; 656 NW2d 195 (2002). The rationale underlying this general rule is that criminal activity, by its nature, is normally unforeseeable. *Id*. An exception to the general rule may be found if a special relationship exists between the plaintiff and the defendant, e.g., landlord-tenant, proprietor-patron, employer-employee, residential invitor-invitee, doctor-patient, carrier-passenger, innkeeper-guest. *Id*. at 494; *Marcelletti v Bathani*, 198 Mich App. 655, 664, 500 NW2d 124 (1993). The rationale underlying the special relationship exception is based on control; in each circumstance one person entrusts his care to another person, who is in control and best able to provide a place of safety. *Williams, supra* at 499. In the context of schools, this Court has recognized that a special relationship may exist between a school agent or employee and a student, thereby imposing a duty to aid or protect. *Cook v Bennett*, 94 Mich App 93, 98, 101; 288 NW2d 609 (1979). "At least in a limited sense the relation of a teacher to a pupil is that of one in loco parentis." *Gaincott v Davis*, 281 Mich 515, 518, 275 N.W. 229 (1937). With respect to a teacher, a duty to exercise reasonable care for the safety of students is premised on a teacher's responsibility for oversight of student activity, and the duty is therefore coterminous with the teacher's presence or obligation to be present. *Cook, supra* at 98.

According to plaintiff's daughter and the investigation conducted pursuant to her allegations, only defendant Johnson was in the classroom when the alleged assault occurred. However, defendant Cryderman, as the head teacher of the classroom, was obligated to be in the classroom to supervise her students. In addition, after another child's complaints regarding the boy, defendants McLean and Miller, assistance directors of Frost Head Start, instituted a new policy that one of them, as assistant directors of Frost Head Start, had to be in the classroom with the boy at all times. Consequently, the individual defendants were either present or had an obligation to be present at the time the injury occurred.

Defendants contend that the duty to use reasonable care does not extend to unforeseeable acts. In *Babula v Robertson*, 212 Mich App 45, 51-53; 536 NW2d 834 (1995), the defendant agreed to baby-sit her nine-year-old niece. After the niece arrived at the defendant's home, the defendant went to her bedroom to sleep. While the defendant slept, the defendant's husband, who had returned home intoxicated only a few hours earlier, sexually molested the niece. This Court held that a special relationship existed between the defendant and the niece, and thereby, the defendant had a general duty to ensure that the niece was not endangered. *Babula, supra* at 51. However, the Court held that because the husband's actions were "wholly unforeseeable" the defendant's duty to use reasonable care in protecting the niece did not extend to the husband's actions. *Id.* at 53.

The individual defendants argue that the present case falls squarely within the holding of *Babula*. Specifically, they argue that the boy's alleged assault of plaintiff's daughter was not foreseeable because the boy had not demonstrated the propensity to be a sexual assailant. But in determining whether conduct is foreseeable, "[a] plaintiff need not establish that the mechanism of injury was foreseeable or anticipated in specific detail. It is only necessary that the evidence establishes that some injury to the plaintiff was foreseeable or to be anticipated." *Schultz v Consumers Power Co*, 443 Mich 445, 452-453 n 7; 506 NW2d 175 (1993). The evidence here established that the boy had previously engaged in violent behavior with other students and

teachers and that Cryderman had previously made a staffing referral on the boy's "behavioral issues in the classroom." In addition, after the first complaint against the boy, Frost Head Start required additional supervision of the boy. While the boy's specific act of sexual assault may not have been foreseeable, the individual defendants were aware that the boy had engaged in physical altercations with other students and teachers. A foreseeable consequence of the failure to provide supervision to a child with violent propensities is that the child might engage in violent or inappropriate behavior with other children. Accordingly, although the exact mechanism of injury that plaintiff's daughter received may not have been foreseeable, it was foreseeable that plaintiff's daughter might be injured by the boy if the individual defendants failed to provide proper supervision. Under these circumstances, whether the individual defendants exercised reasonable care is a question for the finder of fact. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

Reversed and remanded. Jurisdiction is not retained.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald